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Supreme Court, U.S.
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No. 06-452

In The

Supreme Court of the United States

JOHN FENDRICK,

Petitioner,

v.

PPL SER CORP,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether striking for cause a hearing-impaired juror is in direct conflict with Federal Judiciary policies, the American with Disabilities Act (ADA) and Rehabilitation Act?

2. Whether the Third Circuit's opinion that a disabled, hearing-impaired juror could be struck for cause in a disability case is in direct conflict with the Tenth Circuit's decision confirming that the hearing-impaired can serve on a jury and are not *per se* deemed physically infirm because of their hearing limitations?

3. Whether the trial court must accommodate disabled, hearing-impaired jurors instead of striking them for cause?

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Statement of Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit affirming the district court's decision to strike for cause a disabled, hearing-impaired juror from serving on disabled Petitioner's jury was entered on July 25, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Statement of the Case

On the day before disabled workers should be celebrating the anniversary of the passage of the Americans with Disabilities Act (ADA) and its advancements, disabled Petitioner was informed by the Third Circuit that it found that the district court was correct in striking for cause a hearing-impaired juror because she was "in capable, by reason of mental or physical infirmity, to render satisfactory jury service" in his disability discrimination/ failure to accommodate case because she was hearing impaired.

Petitioner, John Fendrick, suffers from Obsessive Compulsive Disorder (OCD) and was discriminated against when PP&L refused to allow him to come back to work on January 29, 2001 when his physician released him to return to work. At that time, Fendrick had worked for PP&L for almost 20 years and never ran into problems with his employment due to his OCD condition until being placed with supervisor, Jim Beecroft.

Fendrick suffered an OCD episode on the night of January 21, 2001, which caused him to take off the following day. Fendrick contacted his supervisor, Beecroft the next day 1/23/01 and informed him of the situation and that he was contacting his physician about his condition. At that time, Beecroft insisted that Fendrick have his physician complete a return to work slip before being allowed back to PP&L.

Fendrick had his doctor fax a return to work slip releasing Fendrick back to work on 1/29/01. PP&L failed to honor that release. Beecroft forced Fendrick to sign an authorization for his medical records and told him to not come back to work until he was contacted by PP&L. PP&L also order Fendrick to undergo a psychiatric exam by Dr. Fischbein. Unbelievably, Beecroft even told Fendrick that someone with his condition should be on disability.

PP&L continuously refused to allow Fendrick back to work in January, February, March, April, May, and half of June. It was not until Fendrick hired a lawyer that he was finally allowed back to work on June 18, 2001.

During jury selection, PP&L requested that the trial court strike Juror 13 for cause due to her "hearing" problem. (A25) Instead of refusing to do so, the trial court granted PP&L's request and struck for cause Juror 13 because of her hearing problem.

This case was heard by a jury of seven (7) with one (1) juror being dismissed during deliberations. The jury of six (6) found in favor of PP&L after two days of deliberation.

Argument

I. THIS PETITION MEETS THE COURT'S STANDARD OF COMPELLING REASONS FOR REVIEW ON A WRIT OF CERTIORARI

Petitioner respectfully requests that this Court accept review of his petition for writ of certiorari to the Third Circuit Court of Appeals. The Third Circuit affirmed the district court's striking for cause a hearing-impaired juror because she was allegedly "in capable, by reason of mental or physical infirmity, to render satisfactory jury service" due to her hearing impairment. However, it is clear from the Federal Judiciary's own policies and procedures, the ADA and the Rehabilitation Act, the district court had an obligation to accommodate the hearing-impaired juror instead of striking her for cause, especially in the instant case when the disabled Petitioner was seeking relief for failure to accommodate/disability discrimination.

The trial court had to "provide reasonable accommodations to persons with communications disabilities". The Guide, Chapter 3, General Management and Administration, Part H, *Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communication Disabilities* (A28-30). There is no question that "it is the policy of the Judicial Conference that all Federal courts provide reasonable accommodations to persons with communication disabilities". *Id.*

The Third Circuit's position is at direct conflict with the Tenth Circuit, which has held that a deaf person can serve on a jury and is not deemed "physically infirm" just because the individual cannot hear. *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987). In connection with the instant matter, the Third Circuit affirmed the trial court's conclusion that Juror 13, who was only hearing-impaired, was "in capable, by reason of

mental or physically infirmity, to render satisfactory jury service" because of her hearing-impairment. Consequently, based on the Tenth Circuit's correct analysis that a deaf juror is not rendered physically infirm because he cannot hear, there is no doubt that Juror 13, who was only hearing-impaired, could not be as well and should have been allowed to serve on Petitioners disability discrimination case.

Many courts correctly refuse to follow the philosophy, which the Third Circuit has now endorse, that somehow just because a person suffers from a disability that disqualifies him from jury service under the umbrella of "physically infirm". As one court has noted "this conclusion that blind jurors are not qualified appears based on exactly the archaic attitudes and unsubstantiated prejudices Congress wished to eradicate." *Galloway v. Superior Court of Columbia*, 816 F. Supp. 12, 16 (D.D.C. 1993). In fact, many states (e.g. Oklahoma, California, Virginia, Oregon, Texas, South Carolina, Washington, Massachusetts, Wisconsin and New York) have passed legislation that specifically forbids the exclusion of the disabled from serving on jury pools. *Id.* at 17.

Therefore, in accordance with the internal policies of the Federal Court System coupled with federal and state law, there was no doubt that the trial court had to provide "... a sign language interpreters or other appropriate auxiliary aid or service..." to Juror 13 instead of striking her for cause. (A28). Consequently, it was an abuse of discretion for the trial court to strike for cause Juror 13 who was qualified to serve and wanted to serve.

II. THE COURT ERRED BY STRIKING A HEARING IMPAIRED JUROR FOR CAUSE IN A DISABILITY DISCRIMINATION/FAILURE TO ACCOMMODATE CASE WHEN THE COURT SHOULD HAVE ACCOMMODATED THE HEARING IMPAIRED JUROR BY USING THE INFRARED SYSTEM THAT WAS AVAILABLE

As Judge Bud Goodman wrote in 1984 before the ADA was even passed:

> [t]he deaf are not poor creatures to be patronized by us, congratulated on their individual efforts to overcome their handicaps and summarily brushed aside. Like members of any cognizable group, the deaf are a part of our community and must be considered, evaluated, and finally either accepted or rejected for services as individuals just as any other citizen. The grounds for exempting the deaf from jury service have vanished. People who are otherwise qualified cannot be challenged for cause under New York Statutory law or the Constitution of this state or of the United States, solely on the basis of deafness. *New York v. Guzman*, 478 N.Y.S.2d 455, 467 (1984).

Just because an individual suffers from a disability does not mean that the individual is physically infirm from serving on a jury.

In connection with the exclusion of female jurors, this Court recognized the importance of including all individuals on a jury. This Court noted that "[t]he truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make

an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded". *Ballard v. United States*, 329 U.S. 187, 193-194 (1946).

Likewise, to exclude the hearing impaired from jury service is not only in violation of the Rehabilitation Act, ADA, but also fundamentally unfair to Fendrick, who was and is a disabled person, seeking redress for disability discrimination, failure to accommodate, and retaliation before a cross-section of his community, which includes individuals, just like him, who are disabled. Consequently, the trial court erred when it arbitrary excluded a class of jurors (i.e. the hearing impaired) from Fendrick's panel and "the resulting harm to the integrity of the judicial system and the expanded used of the preemptory challenges by the prosecution together are sufficiently prejudicial to require a new trial." *United States of America v. Salamone*, 800 F.2d 1216, 1227 (3d Cir. 1986).

The affect of striking a *disabled* juror from the jury for cause is magnified by the fact that Plaintiff, Fendrick, a *disabled* worker, had come to Court to redress the wrongs that his employer PP&L inflicted on him, and not only did his employer escape liability, but the trial court helped his employer do just that by not allowing a disabled person to serve on the jury. Just as Fendrick was penalized for having a disability by PP&L, Juror 13 was penalized because she was hearing impaired.

There is absolutely no excuse why the trial court did not follow the law and the internal operations of Federal Judiciary by providing Juror 13 with "... a sign language interpreter or other appropriate auxiliary aid or service..." (A28). The record does not reflect that Juror 13 was unqualified to serve as a juror. To the contrary, the only reason she was allegedly "unqualified" was based on her hearing impairment, which should have been accommodated. (A31).

Fendrick's counsel asked the trial court to provide Juror 13 with a reasonable accommodation that would allow the testimony to be magnified. Specifically, after counsel for PP&L moved to strike the juror "based on her hearing. I think, by her own admission, she has difficulty hearing things..", Fendrick's counsel asked the Court:

> Ms. Pollick: Well, I don't know. What do the courts do? Do they have anything so that it's magnified?
>
> The Court: I know of nothing that we have.
>
> .....
>
> Ms. Pollick: I want the Court to, just because she's hearing impaired, I don't think that she should be struck for cause. I think that the Court should provide, and *I would think that this Court being so advanced would have material that would enable her to hear.*
>
> Obviously, if we're both under – not on a speaker, you know, wouldn't prejudice one side or the other. We would have to make sure that we speak into the speaker phone and whatnot. So I don't think we should strike her for cause. If there's no equipment, that's nothing, you know, I don't know about that. You know, that's only the Court that can say that, but I would not want to strike her for cause because she has a hearing impairment. (A25-27)(emphasis added).
>
> .....

Here, there is no question that the trial court ***did*** have the infrared assistive listening device available to it, and pursuant to court policies, the trial court was required to use the same. The Guide, Chapter 3, General Management and Administration, Part H, *Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communication Disabilities*. (A28-30; A31). Disabled persons, whether it's a litigant or a juror, should not pay the price for the trial court's failure to adhere to its policies.

Instead of striking for cause a hearing-impaired juror, the trial court should have accommodated the juror, which in this case was easily accomplished by using the infrared assistive listening device system that was available to the court. Therefore, the trial court abused its discretion when it failed to provide an accommodation to Juror 13 when there was no question the trial court had the ability to do the same and was required by its own policies to accommodate the hearing impaired.

The Third Circuit adopted PP&L arguments that the trial court gave "careful scrutiny" in deciding to strike the hearing impaired juror for cause; however, the Court did not even take five (5) minutes to determine that the court was required pursuant to internal policy to accommodate the juror, nor to discover that, yes indeed, we have a system in place that would have remedied this situation instantly. (A23-27; A31-33).

Fendrick should not pay the price for the trial court's failure to accommodate a hearing impaired juror. It clearly is an abuse of discretion to violate the civil rights of a juror by not granting an accommodation that is required by internal procedures and the law.

It is not surprising why PP&L did not want a disabled person on the jury since she would have brought her own "....different perspective on the community. ... [which] ... may be crucial, because the course of a jury's deliberations will often depend on

the familiarity of the jurors with all facets of the community ....". *New York v. Guzman*, 478 N.Y.S.2d 455, 464 (1984). Nonetheless, the trial court had the responsibility to make sure Fendrick was not harmed again by PP&L when PP&L tried to keep the hearing-impaired individual off the jury for cause.

As Judge Goodman so eloquently wrote in *Guzman*, "... ***to challenge every deaf person for cause solely on the basis of deafness, notwithstanding his being otherwise qualified, is to do in the vestibule what could not be done outside the front door***" *Id.* at 465. And unfortunately, that is exactly what happened in this case. The trial court did in its courtroom what it could not have done outside its front door, or for that matter, what it could not do inside based on the Court's own internal procedures.

As this Court has noted "... excluding identifiable segments playing a major roles in the community cannot be squared with the constitutional concept of jury trial. *Taylor v. Louisiana*, 419 U.S. 522; 95 S. Ct. 692; 42 L. Ed. 2d 690 (1974). "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946).

"Amendment VII preserves 'the right of trial by jury' in civil cases, and although the impartiality of the jury is not expressly mentioned it is inherent in the right of trial by jury and is implicit in the requirement of the Fifth Amendment that 'no person shall *** be deprived of life, liberty, or property, without due process of the law ***". *Kiernan v. Van Schaik*, 347 F.2d 775 (3d Cir. 1986). The "right to a fair trial is no less important in a civil proceeding", and is a constitutional right. *Landmark v. Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978).

It has been noted that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society". *Tennessee v. Lane*, 541 U.S. 509; 124 S. Ct. 1978; 158 L. Ed.2d 820 (2004)(*citing* 42 U.S.C. § 12101(a)(7)).

In *Thiel*, this Court held that the exclusion of individuals who earn a wage from jury service could not be justified by federal or state law. *Thiel*, 328 U.S. at 222. The Court reasoned that "prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." *Id.* at 220.

Here, the juror in question was only excluded because of her hearing impairment, and for no other reason. There is no doubt the juror wanted to service since she told the trial court "I was called to jury duty in Wilkes-Barre and I'd always wanted to serve on a jury and so I was all excited after the third time", and believed she could listen to the evidence and decide the case based on what she heard in the courtroom and the instructions of law that would be provided. (A23-25). Consequently, there was no reason to strike her for cause.

Interestingly, it was PP&L who moved for the jury to be stricken for cause based solely on her "hearing" instead of moving for an accommodation, just what Fendrick had asked for and was denied the same by PP&L. PP&L's counsel stated "I would suggest and request that this witness be stricken for cause based on her hearing. ...". (A25).

However, one of the reasons why the ADA and Rehabilitation Act were passed was to ensure that disabled individuals could be involved in the Court system. *29 U.S.C. § 794; 42 U.S.C. § 12131-13134; 28 CFR 42.503.* It is the responsibility of the Court to provide jurors with effective devices of communication. *Id; 28 U.S.C. §1827.*

In *Dempsey*, the trial judge Weinshienk refused to strike for cause a juror just because she was deaf, and the Tenth Circuit affirmed the trial court's decision. *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987). In that case, the trial court *appointed* an interpreter to assist the deaf juror, Hoffman. *Id.* (emphasis added). After defense counsel moved to strike the juror for cause, the Honorable Weinshienk stated:

> Let me just say to you that I feel very strongly about this that handicapped people should be able to partake fully in the jury process; and if that's going to go up on appeal, then it will, but I'm not going to excuse her. Just as I would let someone who is blind go in with a seeing do.

Interestingly, the deaf juror, Hoffman, was chosen by the jury to be its foreperson. *Id.* at 1087.

The Tenth Circuit held that the deaf juror, Hoffman, was qualified under federal statutes to serve as a juror. *Id.* The Tenth Circuit refused to endorse the proposition that the deaf are "incapable, by reason of mental of physical infirmity, to render satisfactory jury service". *Id.* at 1087-88.

Further, the Tenth Circuit noted that the use of an interpreter at trial was an acceptable means to accommodate the disabled juror. *Id.* at 1088. The Circuit also found that Hoffman could accurately evaluate the demeanor of the witness even though she

had to look at the interpreter and the witness at the same time. *Id.*

The Court noted that "[t]he trial judge sought to minimize this effect early in the trial by moving the interpreter nearer to the witness stand so Hoffman could see both at once." *Id.* The Court reasoned that "[m]any jurors have somewhat less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate testimony and evidence." *Id.*

Likewise, in *Guzman*, the Court refused to strike for cause a juror because he was deaf. *New York v. Guzman*, 478 N.Y.S.2d 455 (1984). In *Guzman*, the specific issue before the Court was whether an otherwise qualified deaf person may be challenged for cause on the basis of his deafness. *Id.* The Court answered that question with a resounding no. *Id.* The Court noted that the law governing jury selection was amended in 1983 specifically:

> to remove the arbitrary prohibition against persons with 'physical infirmity' from being impaneled for jury duty, while at the same time, making New York's law accord with the regulations promulgated and proposed under Section 504 of the Rehabilitation Act of 1973, as amended.
>
> The statute, it noted, was amended to abrogate the systematic exclusion of the handicapped without regard to the individual's ability to perform the duties of a juror. This form of pre-determination, based upon the presence of a handicapping condition, contravenes federal regulations made under Section 504 of the Rehabilitation Act of 1973, as amended; and in particular the regulations applicable to court systems made by the Department of Justice (28 CFR Part 42) ... the

> present law by systematically excluding disabled persons from jury panels can threaten the validity of our jury system and the convictions obtained. *Id.*

The Court noted that when faced with a disabled juror the court must determine whether the impairment precludes the juror from serving as a reasonable juror. *Id.* The Court stated that:

> [w]e, as member of a community which profoundly affects the lives of our fellow citizens, must always keep our minds open and alive to new information lest we fall victim once again to the same kind of static prejudiced thinking which has plagued our populace through the years with regard to such issues as race, gender, and age. Though in legal community, and therefore the law itself changes slowly and ponderously, but change it does and must if it is to continue to have a raison d'etre. It is time now to reappraise our previously held ideas on the individual abilities of the deaf. Both information and experience has shown this court that those ideas are in fact outdated and thus no longer applicable. Recent information regarding the deaf, how they communicate generally and how they have functioned as jurors in other jurisdiction forms the basis of this decision[1]. *Id.* at 460-461.

The Court acknowledged that while it is true that a deaf person did not hear all the testimony, that is the same for all jurors since "[h]ow many times have both the judge and the court reporter admonished the participants to speak one at a time so

[1] The Court noted nine (9) jurisdictions (i.e. California, Maryland, Colorado, Oregon, Texas, Florida, Washington, and Illinois) have allowed a deaf juror to serve.

that each person may be heard and a proper record made?" *Id.* at 461.

The Court also stated that both parties are entitled to a fair trial drawn from a cross-section of the community. *Id.* at 462. "It entitles both parties to the inclusion of cognizable groups in the pool of jurors from which a panel will be drawn", but does not "entitle either party to demand the exclusion of any such group". *Id.* at 463 (emphasis added). Moreover, the Court emphasized that:

> [t]he presence of a juror who is a member of a particular group may make available desired information and may provide a different perspective on the community. Those addition as may be crucial, because the course of a jury's deliberations will often depend on the familiarity of the jurors with all facets of the community and on their willingness to believe the testimony of a particular witnesses and the defendant. *Id.* at 464.

The Court profoundly noted that "any jury selection scheme, although not facially discriminatory, but which "by reason of the wide discretion permissible in the various steps of the plan, [may be] applied in such a manner as practically to proscribe any group though by the law's administrator to be undesirable is unconstitutional". *Id.* at 465. In conclusion, the Honorable Goodman eloquently held that:

> to include deaf person in a jury pool, because exclusion would be contrary to state and federal law, ***but to challenge every deaf person for cause solely on the basis of deafness, notwithstanding his being otherwise qualified, is to do in the vestibule what could not be done outside the***

> ***front door.*** This court cannot and will not assume a posture which circumvents the intent of the Legislature--a posture which observes the law in form but flouts it in substance. *Id.* (emphasis added).

Identically, what happened in this case is what the courts in both *Dempsey* and *Guzman* refused to do – exclude the disabled from serving as jurors. Pursuant to Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, the Court had an obligation to provide effective communication devices for hearing impaired juror and could not exclude her from jury duty based solely on her disability. 29 U.S.C. § 794; 42 U.S.C. § 12131-13134; 28 CFR 42.503; *See also, Galloway v. Superior Court of Dist. of Columbia*, 816 F. Supp. 12 (D.D.C. 1993); *Delong v. Brumbaugh*, 703 F. Supp. 399 (W.D. Pa. 1989). Unlike the juror in *Dempsey* and *Guzman*, the juror in question in this case could hear and was not deaf. Therefore, this juror needed far less of an accommodation than the jurors in both cases needed. Both courts seemed to find the "time" to accommodate the disabled; however, here, the trial court did not.

In this case, the only reason the juror was stricken was because the trial court found the juror to be "incapable, by reason of mental or physical infirmity, to render satisfactory jury service" because of her hearing impairment. However, just a cursory review of the Title II of the ADA and the Rehabilitation Act shows that the Court could not and should not have excluded the juror in question solely based on her hearing impairment. *Id.*

PP&L asked the trial court to do what federal law precluded the court from doing – discriminating against the hearing impaired. Instead of striking for cause the hearing impaired juror, the trial court was required by federal law to provide the juror with effective communication device so to ensure that that the

disabled juror was not unilaterally excluded from the jury. *Id.*

There is no question that the juror in question was only excluded because of her hearing impairment. She was otherwise able and willing to serve as a juror, and in fact, wanted to serve as juror. Pursuant to the law, the trial court should have taken the time and done whatever was necessary to ensure that the disabled juror could serve on the jury, and not strike her for cause. There is no doubt that the trial court had an "infrared assistive listening device system", which should have been employed. (A31).

It's a sad day if this Court adopts PP&L's rationale that the trial court just did not have the "time" to accommodate the disabled. With that type of thinking, it's understandable why Fendrick, a disabled worker, was in the trial court in the first place when PP&L offers such unbelievable poor excuses for failing to accommodate the disabled.

PP&L had no right to demand that the hearing impaired juror be excluded from the jury, and the trial court was wrong in granting PP&L's request. As eloquently stated by the Honorable Goodman in *Guzman* case, this Court could not "do in the vestibule what could not be done outside the front door". Therefore, it was improper for the trial court to strike for cause the hearing impaired juror.

The trial court never took the time to see how it could accommodate the hearing impaired juror. Instead, the trial court got rid of its problem the quickest way possible -- by excluding the disabled from jury service. Within a matter of minutes after talking with the juror, the trial court granted PP&L's motion to strike for cause. (A23-A27).

There was no investigation on possible alternatives (i.e. microphones, use of technology courtroom, or an interpreter). Therefore, Fendrick respectfully requests that this Court correct the trial court's error, and grant Fendrick a new trial, which can and should include the disabled if they are so present and willing to participate in jury service.

III. CONCLUSION

For all the foregoing reasons, Petitioner requests that this Court grant his Petition and direct the Third Circuit to vacate the judgment in favor of PP&L and remand the case for a new trial.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1887

JOHN FENDRICK,
Appellant

v.

PPL SERVICES CORP.,
trading as PPL

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 02-1856)

District Judge: The Honorable A. Richard Caputo

Submitted under Third Circuit LAR 34.1(a) - March 28, 2006

Before: MCKEE and VAN ANTWERPEN, Circuit Judges.
and POLLAK,* District Judge.

(Filed: July 25, 2006)

JUDGMENT

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* Honorable Louis H. Pollak, District Judge for the United States District Court of the Eastern District of Pennsylvania, sitting by designation.

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted on March 28, 2006.

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the District Court is affirmed. All in accordance with the Opinion of the Court.

ATTEST:

/s/Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: July 25, 2006

NOT PRECEDENTIAL

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FOR THE THIRD CIRCUIT

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and POLLAK, [1]* District Judge.

(Filed: July 25, 2006)

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1 * Honorable Louis H. Pollak, District Judge for the United States District Court of the Eastern District of Pennsylvania, sitting by designation.

OPINION

POLLAK, District Judge:

Appellant John Fendrick appeals from an adverse jury trial verdict in his disability discrimination case against appellee PPL Services Corp. ("PPL").

Because we write primarily for the parties, who are presumably familiar with the facts and procedural history of the case, we will summarize the facts and history of the case only briefly. Fendrick suffers from Obsessive Compulsive Disorder (OCD), and, while employed by PPL, he experienced an OCD "episode." Fendrick visited a doctor, who recommended restrictions on Fendrick's work conditions, including frequent breaks and no changes in work assignments. PPL determined that it was unable to accommodate the proposed restrictions, and it therefore did not allow Fendrick to return to work. Five months after the episode, Fendrick's health having improved, Fendrick's doctor recommended less stringent restrictions on Fendrick's work conditions, and PPL allowed Fendrick to return to work. During his five-month absence, Fendrick continued to receive his salary by using accumulated sick leave.

Fendrick brought suit against PPL, asserting causes of

action under the Americans with Disabilities Act ("ADA")[2], the Pennsylvania Human Relations Act ("PHRA")[3], and the Family and Medical Leave Act ("FMLA")[4]. Fendrick claimed PPL's delay in allowing him to return to work constituted unlawful discrimination and retaliation within the meaning of the above legislation. The case went to trial, and the jury rendered a verdict in favor of PPL. Fendrick appeals the adverse judgment and contends that the District Court committed reversible error by: 1) striking for cause a hearing-impaired juror rather than accommodating her disability; 2)striking for cause a juror who had been a teacher of Fendrick's counsel's legal assistant; 3) instructing the jury that Fendrick, in establishing his retaliation claim, was required to show as one of the elements of that claim that he was qualified for his job; and 4) instructing the jury that good faith is a valid defense to a failure-to-accommodate claim.

We exercise jurisdiction over this matter pursuant to 28 U.S.C. § 1291. We review for abuse of discretion a district court's decision to exclude a potential juror for cause. *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 153 (3d Cir. 1995). We review jury instructions *de novo* if a timely objection in the district court

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2 42 U.S.C. §§ 12101, *et seq.*

3 43 P.S. §§ 955, *et seq.*

4 29 U.S.C. §§ 2601, *et seq.*

preserved the issue for appeal, but we review only for plain error in the absence of a timely objection. *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128,135 (3d Cir. 1997).

Fendrick's first assignment of error on appeal is that the District Court, in the course of *voir dire*, abused its discretion by striking for a cause a hearing-impaired potential juror. Fendrick claims that the District Court made no attempt to accommodate the juror's disability and urges that, particularly in a disability discrimination case, it is fundamentally unfair to exclude a juror because of that juror's disability. We begin by noting that 28 U.S.C. § 1865 (b)(4) authorizes a district judge to exclude a juror who "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service." Thus, it is proper for a district court to exclude a juror on account of the juror's disability under certain circumstances – that is, when the disability is of a sort that renders the juror unable to perform satisfactory jury service. Moreover, we discern no abuse of discretion in the District Court's application of the statute in this case. Fendrick's assertion that the District Judge made no attempt to accommodate the juror's disability is refuted by the record, which shows that the District Judge evaluated the extent of the juror's impairment and made reasonable efforts to accommodate her. During *voir dire*, the juror in question stated that she had always wanted to serve

on a jury but that she had a ringing in her ears and could not hear people when they turned around or lowered their voices. The District Judge asked the juror if moving her to the front row would enable her to hear the proceedings, to which she responded in the negative. The juror had to ask the District Judge to repeat himself during *voir dire* because, despite the fact that the District Judge was only three or four feet away, she had difficulty hearing him. The juror also stated that she had never used a hearing aid, characterizing herself as "stubborn about it." The District Court heard argument from counsel, during which the possibility of a hearing aid or amplification system was discussed. However, the juror had expressed unwillingness to use a hearing aid, and it became apparent that the courthouse's amplification system would be of limited usefulness. Given these circumstances, we find no abuse of discretion in the District Court's decision to exclude this juror.

Fendrick next contends that the District Court abused its discretion by striking for cause a juror who, as a professor, had once taught Fendrick's counsel's legal assistant. Fendrick argues that mere acquaintance between a juror and a member of the litigant's legal team does not justify dismissal of the juror for cause. We agree. *See United States v. Calabrese*, 942 F.2d 218, 223-24 (3d Cir. 1991). However the District Court did not dismiss

the professor merely because he was acquainted with counsel's legal assistant. In addition to the professor's prior relationship to the legal assistant, the professor disclosed during *voir dire* that he believed an employer had discriminated against him in the past and that his wife had once been precluded from employment for a time because of a disability; as a result of these experiences, the professor expressed some uncertainty as to his ability to consider the case without bias.[5] The District Court determined that, given the professor's acquaintance with Fendrick's counsel's legal assistant *and* his admitted potential for bias based on his own experiences, it was prudent to exclude the professor from the jury in this case. Fendrick offers no argument that undermines that decision, and we discern no abuse of the District Court's

[5]The following is the relevant excerpt from the record:

THE COURT: Do you feel that either of the experiences that you had, yours and hers, prevents you from being fair and impartial in this case?

THE JUROR: That is the kind of question I'm afraid – I'm a cognitive psychologist, so I understand whatever I say is wrong. Yeah, I recognize the kind of bias that everybody does have and I think I probably would be better off hearing people say that they can overcome them they don't understand that those problems actually do exist I do research related to cognition and false memory and things like that. I guess I realize those problems might be in a better position to keep myself from overcoming those biases, but then again some of the literature says you can't do that, so I don't know how to answer that question.

discretion.[6]

Fendrick further contends that the District Court erred by instructing the jury as follows: "To recover against PPL for retaliation, Mr. Fendrick has the burden of proving all of the elements as follows: That he was qualified to perform the job, that he was subjected to an adverse employment action at that time or after the protected conduct took place[,] [a]nd that PPL took adverse employment action because he engaged in the protected conduct." Fendrick argues, and we agree, that the ADA plaintiff need not establish that he was qualified to perform his job in order to recover on a retaliation claim. *See Krouse v. American Sterilizer Co.*, 126 F.3d 494, 502 (3d Cir. 1997). However, Fendrick failed to object to the District Court's instruction, and we therefore review it only for plain error. Under the plain error standard, we will reverse the trial court only where an error was "fundamental and highly prejudicial, such that the instructions failed to provide the jury with adequate guidance and our refusal to consider the issue would result in a miscarriage of justice." *Ryder v. Westinghouse*

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[6] Fendrick also argues that the District Court erred by effectively giving PPL two extra peremptory strikes. This argument is premised on the notion that the District Court erred in striking for cause the two jurors already discussed above. Because we find that the District Court did not so err, we need not reach this argument.

Elec. Corp., 128 F.3d 128, 136 (3d Cir. 1997). Our cases instruct that "[p]lain error review is discretionary - it 'should be exercised sparingly' and 'should only be invoked with extreme caution in the civil context.'" *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 341 (3d Cir. 2005) (quoting *Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995)).

Viewed in isolation, the portion of the District Court's instruction quoted above was erroneous. However, reading the quoted portion in context and viewing the District Court's retaliation instruction as a whole reveals no plain error. The District Court began its retaliation instruction as follows: "In order to prevail on this [retaliation] claim Mr. Fendrick must prove each of the following elements by a preponderance of the evidence. First, that he engaged in conduct protected by the Americans with Disabilities Act. Second, that he was subjected to an adverse employment action at that time or after the protected conduct took place. And third, PPL - PPL took the adverse employment action against Mr. Fendrick because of his protected conduct." This is a correct statement of the elements of the ADA's retaliation cause of action. *Krouse*, 126 F.3d at 500. After providing this correct instruction, the District Court went on to explain that a retaliation claim is evaluated using a burden-shifting framework;

in explaining the burden-shifting framework, the District Court restated the elements of a retaliation claim, but in doing so, replaced its correct statement of the first element - protected conduct - with an incorrect statement of job qualification as the first element[7]. Bearing in mind that the District Court had already correctly instructed the jury on the elements of the ADA retaliation cause of the action and was simply restating the elements as part of its explanation of the burden-shifting framework when it accidentally transposed an element from a related cause of action, we think a reasonable jury might, indeed, have recognized that the Courts restatement contained the verbal equivalent of a typographical error. We are not, therefore, prepared to say that the erroneous formulation was so clearly prejudicial to Fendrick as to amount to plain error.

Fendrick's final contention on appeal is that the District Court erred by instructing the jury that good faith is a defense to a

[7]The relevant portion of the District Court's burden-shifting instruction reads as follows: "Now, because this is a retaliation claim, there is a burden shifting process which must go on. And I'm going to now instruct you on this burden shifting process. To recover against PPL for retaliation, Mr. Fendrick has the burden of proving all of the elements as follows: That he was qualified to perform the job, that he was subjected to an adverse employment action at that time or after the protected conduct took place[,] [a]nd that PPL took adverse employment action because he engaged in the protected conduct."

failure-to-accommodate claim. Fendrick asserts that good faith is not a defense to a failure-to-accommodate. Fendrick is wrong. 42 U.S.C. § 1981a(a)(3) states, in relevant part, that "[i]n cases where a discriminatory practice involves that provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act . . . damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." Good faith is thus a defense to a failure-to-accommodate claim, at least insofar as monetary damages are sought in connection with such a claim. Moreover, even if the District Court's instruction as to good faith were deemed to be in error, the error would have been harmless, since the jury, having found that Fendrick failed to show a failure to accommodate, had no occasion to consider the good faith defense. Fendrick has thus shown no reversible error in the District Court's jury instruction on accommodation.

For the foregoing reasons, we will affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN FENDRICK,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION NO. 3:CV-02-1856
v.	:	
	:	
PPL SERVICES CORP.,	:	(JUDGE CAPUTO)
	:	
Defendant.	:	

JURY VERDICT INTERROGATORIES

1) Did Plaintiff meet his burden of proving by a preponderance of the evidence that Defendant discriminated against him in violation of the Americans with Disabilities Act?

Answer: Yes _____ No s/ X

If you answered "Yes" to question 1, go on to question 2.
If you answered "No" to question 1, go on to question 4.

2) Did Defendant meet its burden of proving by a preponderance of the evidence that it would have made the same decision had disability discrimination not been a motivating factor?

Answer: Yes _____ No _____

If you answered "Yes" question 2, go on to question 4.
If you answered "No" question 2, go on to question 3.

3) State the damages to which Plaintiff is entitled for Defendants discrimination.

a) Backpay $_____

b) Compensatory Damages $_____

Go on to question 4.

4) Did Plaintiff meet his burden of proving by a preponderance of the evidence that Defendant retaliated against him in violation of the Americans with Disabilities Act?

Answer: Yes _____ No __s/X__

If you answered "No" to question 4, go on to question 6.
If you answered "Yes" to question 4, go to question 5.

5) State the damages to which Plaintiff is entitled for Defendant's retaliation.

a) Backpay $_____

b) Compensatory Damages $_____

Go on to question 6.

6) Did Plaintiff meet his burden of proving by a preponderance of the evidence that Defendant failed to accommodate him in violation of the Americans with Disabilities Act?

Answer: Yes _____ No s/X

If you answered "Yes" to question 6, go on to question 7.
If you answered "No" to question 6, go on to the last page and sign and date the verdict slip.

7) Did Defendant meet its burden of proving by a preponderance of the evidence that it acted in good faith in seeking to find a reasonable accommodation for the Plaintiff?

Answer: Yes _____ No _____

If you answered "No" to question 7, go on to question 8.
If you answered "Yes" to question 7, go to question 8(a) only and then sign and date the verdict slip.

8) State the damages to which Plaintiff is entitled for Defendant's failure to accommodate.

a) Backpay $_____

b) Compensatory Damages $_____

Jury Foreperson must date and sign this Special Verdict in the spaces provided.

s/7/6/04	s/Jeane
Date	Foreperson Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN FENDRICK,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION NO. 3:02-CV-1856
v.	:	
	:	
PPL SERVICES CORP.,	:	(JUDGE CAPUTO)
	:	
Defendant.	:	

MEMORANDUM

Presently before the Court is Plaintiff's Motion for New Trial. (Doc. 59.) I will deny the motion because there was no significant error of law which prejudiced the moving party and the verdict was not against the weight of the evidence.

BACKGROUND

John Fendrick has worked at PPL Services Corporation (hereinafter PPL) for more than twenty years. In 2001, Mr. Fendrick missed a week of work due to his Obsessive-Compulsive Disorder. At PPL's request, Mr. Fendrick submitted his doctor's explanation of the restrictions to his working conditions, which included breaks as needed, not to exceed 15 minutes per hour, and no changes in Mr. Fendrick's work assignments. PPL did not permit Mr. Fendrick to return to work because of concerns

about requested restrictions. Instead, PPL requested time to review Mr. Fendrick's medical history. PPL eventually conducted an Independent Psychological Examination. During this time when he was not allowed to work, Mr. Fendrick had to use his accumulated sick leave. After five months, Mr. Fendrick's doctor changed the work restrictions, and PPL permitted Mr. Fendrick to return to work.

Mr. Fendrick brought suit against his employer alleging various claims of discrimination, harassment, and retaliation under the Americans with Disabilities Act (hereinafter ADA), the Pennsylvania Human Relations Act, and the Family Medical Leave Act. I granted summary judgment for Defendant regarding the harassment claims and all of the Family Medical Leave Act claims, and I denied summary judgment on the retaliation and discrimination claims under the Americans with Disabilities Act and the Pennsylvania Human Relations Act. (Doc. 30.) At trial, the jury returned a verdict for Defendant, finding that Defendant did not discriminate against Plaintiff, retaliate against Plaintiff, or fail to accommodate Plaintiff's disability. (Doc. 58.) Plaintiff then filed the present Motion for New Trial. (Doc. 59.)

LEGAL STANDARD

Under Rule 59(a), motions for a new trial must be filed within ten days of the date the judgment was entered. *See* FED.

R. CIV. P. 59. The decision to grant a new trial is left to the sound discretion of the trial judge. *See Blackiston v. Johnson,* No. 91-5111, 1995 WL 563834, at *1 (E.D. Pa. 1995), *aff'd* 91 F.3d 122 (3d Cir. 1996), *cert. denied* 519 U.S. 953 (1996). Courts have granted motions for new trial where: (1) there is significant error of law, to the prejudice of the moving party; (2) the verdict is against the weight of evidence; (3) the size of the verdict is against the weight of the evidence; or (4) counsel engaged in improper conduct that had a prejudicial effect on the jury. *See Maylie v. Nat'l R.R. Passenger Corp.*, 791 F. Supp. 477, 480 (E.D. Pa.), *aff'd* 983 F.2d 1051 (3d Cir. 1992). Where the evidence is in conflict and subject to two or more interpretations, the trial judge should be reluctant to grant a new trial. *See Klein v. Hollings*, 992 F.2d 1285, 1295 (3d Cir. 1993).

DISCUSSION

Plaintiff raises five separate grounds for new trial: (1) the Court improperly excused a hearing impaired juror instead of providing her with accommodation; (2) the jury instruction regarding mixed motive was improper; (3) the jury instruction on failure to accommodate was improper; (4) the verdict slip was legally incorrect; and (5) the verdict was against the great weight of the evidence.

1) Failure to Object

As a preliminary matter, objections to jury instructions and verdict slips are waived if they are not raised by the time the jury retired for its deliberations. FED. R. CIV. P. 51; *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 200 (3d Cir. 1995). In the present case, Plaintiff failed to raise objections to several of the jury instructions and portions of the verdict slip which are now challenged in the current motion.

Plaintiff was given an opportunity to raise objections to the jury instructions, and he did so for several instructions. However, he did not raise any objection to the mixed motive instruction, nor did he object to the failure to accommodate instruction. Plaintiff did object to the inclusion of a burden shifting instruction related to the failure to accommodate claim, but that objection is moot because the jury never reached the burden-shifting analysis since the jury concluded that there was no failure to accommodate. Thus, the Plaintiff has waived any arguments related to errors in jury instructions.

With regard to the verdict slip, the parties were provided with a copy of the verdict slip prior to its submission to the jury. The parties were given the opportunity to object to the verdict slip, and Plaintiff raised three objections. The only objection still relevant pertains to the discrimination question on the verdict

slip. Any legal incorrect portions of the verdict slip beyond this are waived by Plaintiff's failure to raise timely objections.

There is a narrow exception to the waiver requirement, for instance in which there would be a gross miscarriage of justice or if the error of law was plain. *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 463 (3d Cir. 1997) (citing *Neely*, 63 F.3d at 200 n.39 and the *United States v. Zehrbach*, 47 F.3d 1252, 1260 n.6 (3d Cir. 1995) (en banc), *cert. denied*, 514 U.S. 1067). However upon review of the jury instructions and verdict slip, I find no plain error or manifest injustice. Thus, I will not grant an new trial on the grounds that the mixed motive instruction was improper, the failure to accommodate instruction was improper, or the verdict slip was legally incorrect. I will consider motion for new trial on the grounds of the dismissed juror, the improper verdict slip as it pertains to the mixed motive instruction, and the verdict as being against the weight of the evidence.

2) Hearing Impaired Juror

The Court is empowered to dismiss jurors who are not qualified or otherwise exempt from jury duty. 28 U.S.C. § 1865(a). A person is not qualified to serve on a jury if he or she "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service." 28 U.S.C. § 1865(b)(4). When reaching this determination, the Court may consider "information provided

on the juror qualification form and other competent evidence." 28 U.S.C. § 1865(a).

During the voir dire process in the present case, as a screening question, all members of the jury pool were asked if they had any physical limitations which would prevent them form serving on a jury. At the time, Juror 13 identified herself as having a hearing impairment. When questioned further, Juror 13 explained that she was hearing impaired and that her impairment made her last time serving on a jury difficult. The Court suggested seating her in the front row of the jury box, but Juror 13 felt that would not solve her difficulty hearing. She specifically recounted her prior jury duty in Wilkes-Barre, where the court seated her close to the witness stand, yet she had great difficulty understanding the attorneys and the witnesses. In particular, she commented that she would "lose" words when people turned their heads or lowered their voices. Even in the course of voir dire for the present case, I observed that Juror 13 missed one of my questions while she sat less than four feet from me.

Plaintiff suggested that the Court employ a sound amplification system for Juror 13. The Court conferred with the Court Room Deputy, and discovered that a system had been experimented with in the modern courtrooms, but the experiment did not meet with success. In particular, the system was flawed

because microphones were not available for every speaker in the courtroom, and the microphones available did not capture sound well unless the speaker directed his or her speech into the microphone directly. Based on this information, I determined that the amplification system was not a viable option.

Given all of this information, I excused Juror 13 because her hearing impairment prevented her from serving on the jury and I did not believe the Court was able to provide her an accomodation[1] which would permit Juror 13 to properly hear the testimony, arguments of counsel, and the instructions from the Court. It should be noted that Juror 13 was not dismissed because she suffered from a physical impairment, she was dismissed, based on the information available to the Court, Juror 13 was not able to render satisfactory jury service. Upon review of this decision, I see no error.

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[1] I also note that Juror 13 said she did not presently wear a hearing aid, nor had she ever worn one, because she identified herself as being "stubborn." While the Court respects her personal decision, it also limited the available accommodations the Court could provide for Juror 13.

3) Improper Verdict Slip

Plaintiff's next argument is that the verdict slip was legally improper because it confusingly asked the jury whether the Defendant discriminated against Plaintiff without reiterating the "motivating factor" element. The law is clear that a plaintiff meets his burden of proving that he was discriminated against him in violation of the ADA when he shows by a preponderance of the evidence that he was disabled, he was qualified for the job (with or without reasonable accommodations), and he was subjected to an adverse employment action because of his disability. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999) (quoting *Gaul v. Lucent Techs.*, 134 F.3d 576, 580 (3d Cir. 1998)). In the present case, the jury was clearly instructed on the elemental burdens upon Plaintiff. Specifically, I instructed the jury that Plaintiff needed to show only that he was subjected to an adverse employment action, and that his disability was a motivating or determinating factor in the Defendant's decision. In the context of these instructions, the jury was then given a verdict slip which asked "Did Plaintiff meet his burden of proving by a preponderance of the evidence that Defendant discriminated against him in violation of the Americans with Disabilities Act?"[2] (Doc. 58 at 1.) Clearly, this question required the jury to incorporate all of the definitions they received in the instructions

shortly before their deliberations, including the mixed motive instruction.

Plaintiff's reliance upon *Curley v. Klem*, 298 F.3d 271 (3d Cir. 2002), for the proposition that the Court should have included the "motivating factor: language in the verdict slip is misplaced. The Court of Appeals for the Third Circuit said in *Curley* that a court *may* submit special verdict questions to the jury and then resolve the ultimate liability itself. *Id.* at 279. This is consistent with Rule 49(a) of the Federal Rules of Civil Procedure. However, this form of a special verdict is not

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[2]Jury not only had the verdict slip with them in the deliberations, they had an outline of the jury instructions with the headings includes:

3) **AMERICANS WITH DISABILITIES ACT (ADA)**
   - a) **NATURE OF THE CLAIM**
   - b) **STATUTE DEFINING THE CLAIM**
   - c) **DISABILITY (STIPULATION)**
   - d) **QUALIFIED INDIVIDUAL**
   - e) **REASONABLE ACCOMODATION**
   - f) **UNDUE HARDSHIP**
   - g) **DISCRIMINATION**
     - i) **Adverse Employment Action**
     - ii) **Mixed Motive**

(Doc.73 at 1.) In addition, the jury had an auditory recording of the entire jury instructions which was recorded as I instructed the jury. They were able to re-hear any portion of the jury instructions as they needed it during their deliberations.

required. *E.g.*, *Potence v. Hazleton Area Sch. Dist*, 357 F.3d 366, 372, (3d Cir. 2004); *see generally* 35B C.J.S. *Federal Civil Procedure* § 1004 (2004) ("[T]he necessary and propriety of the submission of special interrogatories or questions to the jury for a special verdict is within the discretion of the trial judge.") In the present case, the Court elected to submit a more general verdict slip which only asked the ultimate question of liability for each cause of action. I find no legal error in the verdict slip.

4) Verdict Against the Weight of the Evidence

Plaintiff last argues that the Court should grant a new trial because the verdict was against the weight of the evidence. I disagree. Plaintiff submitted sufficient evidence to avoid a judgment for defendant as a matter of law, but the evidence was not so compelling as to require a verdict in Plaintiff's favor. The factual issues to be determined by the jurors included whether Defendant's decisions were motivated by Plaintiff's disability, and whether Defendant failed to provide a reasonable accommodation for Plaintiff's disability. In particular, Defendant presented evidence that it required Plaintiff to not work only it they assessed the feasibility of his requested accommodation. Defendant also presented evidence that delays in the evaluation process were the result of difficulty obtaining medical records. Defendants also had concerns about Plaintiff's ability to perform

his job without posing a safety risk. All of this evidence supports the jury's verdict.

In regard to the failure to accommodate, Defendant presented evidence that the original requested accommodation was not the accommodation finally requested. Thus, they were not able to accommodate Plaintiff reasonably until his need for breaks changed from an indefinite number of breaks to a fixed number of breaks which would be gradually reduced over several weeks. The jury was left to determine whether Defendant could reasonably accommodate Plaintiff's disability. The evidence presented by Defendant supports the jury's conclusion that Defendant did not fail to provide a reasonable accommodation. Thus, I find that the jury's verdict was not against the weight of the evidence.

CONCLUSION

I will deny Plaintiff's motion for new trial because the Court did not improperly excuse a hearing impaired juror, nor was the verdict against the weight of the evidence, and the remainder of the Plaintiff's challenges were waived by Plaintiff's failure to raise timely abjections during trial.

An appropriate order follows.

s/ March 8, 2005
Date

s/ A R Caputo
A. Richard Caputo
United States District Judge

THE COURT: We'll go to number 13.

Good morning, again. Now, we wanted to ask you a little bit more about your impairment.

THE JUROR: Right.

THE COURT: Do you think that moving you into the front row would make any difference?

THE JUROR: No.

THE COURT: Okay.

THE JUROR: I really don't. I had this problem. I was called to jury duty in Wilkes-Barre and I'd always wanted to serve on a jury and so I was all excited after the third time. And when people turn around, when they drop their voice, I lose it and I also have a ringing.

THE COURT: Do you wear a hearing aid?

THE JUROR: No.

THE COURT: Have you ever worn one?

THE JUROR: No. I'm kind of stubborn about it, you know.

THE COURT: All right. You answered – you also answered a question to the effect, affirmatively or yes to, have you or any member of your family ever to stop work and/or go out on disability because of a health problem that kept them from working.

THE JUROR: Oh, I'm sorry. See, I didn't hear the end of that.

THE COURT: Okay.

THE JUROR: And did you say kept working?

THE COURT: That kept them from working.

THE JUROR: Oh, kept them from working. Yeah, my Mom. She had advance arthritis. She's 86 now and she had it in her hands. It got to be where she had shots in her fingers, and she was a sewing machine operator. So that was about '72 in the flood. I've had a number of people who've been on disability because of health problems.

THE COURT: All right. Do you feel they all were treated fairly?

THE JUROR: Yeah, yeah.

THE COURT: Do you think any of that experience regarding the people that you know had disabilities would prevent you from being fair and impartial in this case?

THE JUROR: No, I don't think so.

THE COURT: Do you think you could listen to the evidence end decide the case based on what you heard in the courtroom and the instructions on the law that I tell you applies?

THE JUROR: Yes, I do. If I could hear it, yes I do.

THE COURT: I understand. You also answered a question

yes, have you or any member of your family or close friends ever been accused of discriminating against somebody.

THE JUROR: Right. After I said that, I was thinking if I used the right word. My cousin's wife, not a member of our side of the family, was sued in Washington for, don't know if it would be defaming, calling her black neighbor an unfortunate name. And she was sued for that, I don't know if that would be discrimination or defamation, so that's why I raised my hand.

THE COURT: I See. How long ago was that?

THE JUROR: I'd say about seven or eight years ago. And she lost the case, too.

THE COURT: Does that circumstance in any way prevent you from being fair and impartial in this case?

THE JUROR: No.

THE COURT: Any questions?

THE JUROR: No, Your Honor.

MS. POLLICK: No.

THE COURT: Thank you very much.

THE JUROR: Okay. Thank you.

(Juror excused.)

MR. OSSIP: I would suggest and request that this witness be stricken for cause based on the hearing. I think, by her own admission, she has a difficulty hearing things. And I think it's

a large courtroom, I'm on the other side of the courtroom, and I think I might be prejudiced if she can't hear everything that comes in.

MS. POLLICK: I'm going to request that the Court provide her with a hearing. I don't think just because she has a hearing problem we can't accommodate her –

THE COURT: Provide her with what, a hearing aid?

MS. POLLICK: Well, I don't know. What do the courts do? Do they have anything so that it's magnified?

THE COURT: I know of nothing that we have.

THE CLERK: There is a system they were trying it out in Judge Vanaskie's courtroom, that's actually like a headphone set that goes over the juror's –

THE COURT: From the microphones? Does everybody have a microphone?

THE CLERK: Well, that's just it, everyone doesn't have a microphone. It just works through the regular speaker system. It amplifies the regular speaker system but if people are away from the microphone it doesn't work. I guess that's what I'm trying to say. We did try to set up that system but it didn't work well.

MR. OSSIP: I just don't think that either side, Your Honor, can take the risk that one of the eight jurors would not hear important testimony.

THE COURT: The fact of the matter is, she didn't hear part of the question I asked. What am I, seven feet away, eight feet.

MR. OSSIP: Three or four feet actually.

MS. POLLICK: Well, I think if the court provides her with some sort of hearing aide.

THE COURT: Your point is well taken, except I don't know that we have any, the means to provide her with a hearing aide other than the means the Mr. Miller just talked about, which apparently has had limited application. So I'm inclined to – why don't you make your motion for the record clear, exactly what you want the Court to do.

MS. POLLICK: I want the Court to, just because she's hearing impaired, I don't think that she should be struck for cause. I think that the Court should provide, and I would think that this Court being so advanced would have material that would enable her to hear.

Obviously, if we're both under - - not on a speaker, you know, wouldn't prejudice one side or the other. We would have to make sure that we speak into the speaker phone and whatnot. So I don't think we should strike her for cause. If there's no equipment, that's nothing, you know, I don't know about that. You know, that's only the Court that can say that, but I would not want to

strike her for cause because she has a hearing impairment.

MR. OSSIP: And I'm not suggesting we strike her just because she has a hearing impairment, but it's the impact by her own admission. Our own experience with her in the voir dire as well as in the ante room here, as well as her previous experience not being selected for a jury because the hearing problem. It's a shame, but we obviously, all parties in the court, need members of the jury who will hear all the evidence.

THE COURT: Yeah, it's a delicate question, I must say. I think it's not appropriate for someone to sit if they're unable to hear everything. I don't think we have the technology at least that could be put into an application in time for this person to serve and hear everything. I'm not going to require that counsel sit at counsel tables. I think it's important that counsel be permitted to try the case in the fashion that they see fit.

We don't have mobile microphones, do we?

THE CLERK: No, not to work through this particular system, no.

THE COURT: So, as a consequence, I am going to excuse her for cause.

September 29, 2003

CHAPTER 3: GENERAL MANAGEMENT AND ADMINISTRATION

Part H. Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communications Disabilities

CONTENTS

1. General Policy
2. Sign Language Interpreters and Other Auxiliary Aids and Services
3. Jurors
4. Procedures
5. Reporting
6. Effective Date

Form – Report of Services Provided to Persons with Communications Disabilities

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1. General Policy.

As adopted in September 1995, it is the policy of the Judicial Conference that all Federal courts provide reasonable accommodations to persons with communications disabilities.

2. Sign Language Interpreters and Other Auxiliary Aids and Services

Each federal court is required to provide, at judiciary expense, sign language interpreters or other appropriate auxiliary aids and services to participants in federal court proceedings who are deaf, hearing-impaired, or have other communications disabilities. The court shall give primary consideration to a participant's choice of auxiliary aid or service.

"Auxiliary aids and services" include qualified interpreters, assistive listening devices or systems, or other effective methods of making aurally delivered materials available to the individuals with hearing impairments. [1] "Participants" in court proceedings include parties, attorneys, and witnesses. The services called for under these guidelines are not required to be provided to spectators, although courts may elect to do so in situations where they determine such to be appropriate, for example, providing an interpreter to the deaf spouse of a criminal defendant so that the spouse may follow the course of trial. "Court Proceedings" include trials, hearings, ceremonies and other public programs or activities conducted by a court. "Primary consideration" means that the court is to honor a participant's choice of auxiliary aid or service, unless it can show that another equally effective means of communication is available, or that the use of the means chosen would result in fundamental alteration in the nature of the court proceeding or in undue financial or administrative burden.

3. Jurors.

The determination of whether a prospective juror with a communications disability is legally qualified to serve as a juror is one for the judgment of the trial court under the Jury Selection and Service Act, and that determination is not governed or effected by these guidelines. However, where an individual with a communications disability is found so qualified, a sign language interpreter or other appropriate

auxiliary aid or service should be provided under these guidelines.

4. Procedures.

Each court is required to a specific office or individual(s) to serve as access coordinator from whom participants in court proceedings may request auxiliary aids or services. The access coordinator must be familiar with the judiciary's policy of providing reasonable accommodations to persons with communications disabilities, to ensure that the policy is properly implemented. The access coordinator must have a ready working knowledge of the types of auxiliary aids and services available to serve the needs of disabled persons and of the local sources from which auxiliary aids and services may be procured. Personnel in each court are to be instructed as to the judiciary's policy and the identity and the location of its access coordinators in their particular court. Each court shall appropriately publicize the identity and location of its access coordinator though courthouse signs, bulletin board announcements, pamphlets, announcements in the local press, etc.

Courts may, but are not required to, establish specific procedures through which requests for auxiliary aids services are to be submitted, such as requiring that they be submitted to the access coordinator in writing or that they be submitted in advance of the court proceeding involved. Courts may also establish procedures through which persons dissatisfied with the court's proposed provision of auxiliary aids and services may seek review or reconsideration. Any such procedures must be appropriately publicized. These guidelines are not intended to, nor should they be construed to extend or modify existing law.

5. Reporting.

In all situations in which services are provided under these guidelines, regardless of whether any direct new costs are incurred, courts are to file reports with the Administrative Office on forms provided for this purpose.

6. Effective Date.

These guidelines are now in effect.

(1) Where a court determines such to be appropriate, computer-assisted real-time reporting is one of the services that may be provided under these guidelines, but solely in furtherance of the limited purposes for which the guidelines have been adopted. Thus, real-time reporting should be provided only for as long as and for the specific purposes required by the participant; for example, only for the duration of a deaf witness's testimony. Real-time reporting is to be used solely to assist in communication and is not to be used in lieu of conventional means of producing the official record. Real-time service provided under these guidelines shall be limited to a video display of spoken words, and shall not include enhancements such as key word searching or the provision of unedited daily transcripts. Courts may not use this policy as an authorization to purchase and install real-time court reporting equipment in the courtroom. Such purchase is controlled by Judicial Conference policy relating to the methods of court reporting.

United States District Court
Middle District of Pennsylvania

The Electronic Courtroom

Courtroom 2

The William J. Nealon Federal Building
and U.S. Courthouse,
Scranton, Pennsylvania

The United States District Court for the Middle District of Pennsylvania opened its first fully electronic courtroom, Courtroom 2, in April of 1999 in the William J. Nealon Federal Building in Scranton.

Courtroom 2 uses the latest advanced technology to facilitate the presentation of both testimony and evidence to the court, including a state-of-the-art sound system and **an infrared assistive listening device system.** (emphasis added).

Additionally, video monitors are strategically placed around the courtroom. The judge, the witness, the courtroom deputy, and each of the counsel tables have a video monitor for the display of evidence. The jury box has four 17" monitors in the front row, one monitor placed between every two juror chairs. The back row has four 15" flat panel monitors in a similar arrangement. There is also a 37" monitor just inside the well of the court, so those in the gallery may view evidence displayed through the system.

At the heart of the electronic courtroom is the visual presentation

cart, centrally located between the four counsel tables, which contains most of the presentation electronics.

The Visual Presentation Cart
The visual presentation cart gives counsel the ability to present evidence in multiple media formats. It contains the following devices:

ELMO evidence presentation equipment enables counsel to present evidence through the video monitors. The evidence can be in virtually any medium: paper documents, photographs, negatives, x-rays, and even three dimensional objects.

The Elmo is not limited to Courtroom 2. Portable Elmo units are available in any courtroom. If you feel an Elmo unit would benefit your case, speak to your Judge's Courtroom Deputy to arrange for one to be made available to you.

Video Cassette Recorder allows playback videotaped evidence and testimony through the video monitors. The VCR's freeze-frame feature allows the operator to freeze an image or slowly advance one frame at a time through a key video sequence.
Annotation tablet with video marker lets counsel draw on, point to, and highlight any evidence or document that is being displayed through the system. Counsel may also use the video system as a blank whiteboard to draw or write on a blank screen.

Computer Connections Allow counsel to present trial documents and/or evidence through the video system by way of audio and video connections to a notebook computer.

Color Video Printer allows counsel to print and still image displayed on the courtroom monitors, converting the image to an 8.5 x 11" color hard copy that may be entered into evidence.

Counsel Tables
Each counsel table provides a recessed monitor for viewing presented video evidence. Each table is also equipped with a microphone as well as power, telephone, and computer connections. Counsel can hook up their own computers and use PowerPoint, or their own evidence display technology. The advanced counsel tables also provide modem connections to allow counsel to dial into networks outside of the courthouse, or perform legal research.

Witness Stand
The witness stand is fitted with a 14" LCD Touch-Monitor which allows the witness to both view and annotate any evidence presented on the system. Witnesses may point at, highlight, and draw over any evidence by simply drawing on the screen with his or her finger.

Additionally, the witness stand is the focal point of a 3-CCD overhead document camera, which allows the court to see any documents, photographs, or three dimensional evidence presented to a witness.

Video Teleconferencing Equipment
The courtroom is set up to use a V-Tel dual monitor video teleconferencing system to allow for testimony and distance meetings from remote locations. The teleconference may also be recorded for future reference using the V-Tel's VCR.

Digital Whiteboard
Also available to the court is a standard whiteboard equipped with a *mimio* infrared capture system which reproduces handwritten input from the whiteboard, allowing this information to be shared via the court's video system, or printed on paper to be entered into evidence.

The Judge's Bench

The Judge's Bench is the control center for all of the courtroom technology.

Here the A/V system is controlled by two touch panel controllers, one for the Clerk, the other on the Judge's bench. These touch panel controllers manage the audio and video systems in the courtroom.

It also controls the Witness overhead camera, all of the courtroom monitors, and the video sources from the counsel tables and the presentation cart. Using either touch panels, any or all of the evidence presentation system may be turned off in the judge determines that evidence should not be made available to the jury.

The Judge's Bench also features a 14" Flat Panel LCD monitor on which he or she may view the evidence presented by way of the video system, or preview any video source.

The Judge's bench is also equipped with a full mid-tower PC and a notebook computer connection. These systems enable the judge to take notes electronically, view real-time reporting, and conduct legal research.

The Court Reporter's station is also equipped with a similar mid-tower PC for real-time transcription. Real-Time transcription is used to capture the courtroom record. At the present time, it is forwarded to the Judge's Bench only. The court is using Stenograph Corporation's Case View II software.

The Future

Courtroom 2 is already equipped with three additional recessed video camera pockets, anticipating the future video taping of court proceedings.

The court is in the process of installing digital recording technology, as well as investigating the technology to allow us to dial into remote language interpreter services from the courtroom.

Making Use of the Technology

Courtroom 2 is available for any trial in which the technology would benefit the presentation of evidence. If you would like to make use of this technology, you may request it with our Operations Manager, Kevin Calpin, at (570) 207-5601.

It is *highly* recommended that you familiarize yourself with the equipment and practice using it before relying on it in court. Once a trial has been scheduled for Courtroom 2, you may arrange for a time to work with the equipment by speaking with the assigned Judge's Courtroom Deputy.

2

No. 06-452

In The
Supreme Court of the United States

JOHN FENDRICK,

Petitioner,

v.

PPL SERVICES CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Third Circuit's Opinion, which affirmed the district court's proper exercise of its discretion in excusing Juror No. 13, does not conflict with any decision of this Court or of any other Court of Appeals, and does not implicate any important unsettled federal question.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent, PPL Services Corp. is a non-governmental party to this litigation. The parent corporation of PPL Services Corp. is PPL Corporation. PPL Corporation is the only publicly held company that owns 10% or more of PPL Services Corp.'s stock.

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OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, PPL Services Corp. respectfully requests that the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered July 25, 2006 be denied. In support thereof, PPL Services Corp. represents as follows:

OPINIONS BELOW

The Third Circuit Court of Appeals Opinion, which was marked "Not Precedential" by that court, was published at 2006 WL 2053114. The opinion of the Third Circuit Court of Appeals is included in Appendix A to the Petition (A-3). The district court's March 8, 2005 Memorandum denying Plaintiff's Motion for a New Trial is unreported.

JURISDICTION

The Third Circuit entered its decision in favor of PPL Services Corp. on July 25, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Third Circuit Court of Appeals decision on a Writ of Certiorari.

INTRODUCTION

Petitioner has presented no "compelling reasons" to grant his Petition for Writ of Certiorari ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Third Circuit's July 25, 2006 Opinion ("Opinion") is in conflict with any decision of this Court or of any other Court of Appeals, or that the Third Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner John Fendrick ("Petitioner" or "Fendrick") brought the underlying action against Respondent PPL Services Corp. ("PPL" or "Respondent") alleging various claims of discrimination, harassment and retaliation under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ("ADA"), the Pennsylvania Human Relations Act, 43 P.S. §955 *et seq.* ("PHRA"), and the Family and Medical Leave Act, 29 U.S.C. §2601 *et seq.* ("FMLA").[1] During the voir dire, Juror No. 13 answered affirmatively when prospective jurors were asked if they had any physical disabilities that might interfere with their ability to serve as a juror. The district court then conducted individual voir dire on the record with Juror No. 13 and all others who responded affirmatively to this and other voir

[1] The district court granted summary judgment in favor of PPL on the harassment claims and the FMLA claim. Only the retaliation, failure to accommodate, and discrimination claims brought pursuant to the ADA and the PHRA went to trial.

dire questions. (A-28 to 33). The court first asked her whether moving her into the front row would "make any difference." *Id.* Juror No. 13 responded:

> I really don't. I had this problem. I was called to jury duty in Wilkes-Barre and I'd always wanted to serve on a jury and so I was all excited after the third time. And when people turn around, when they drop their voice, I lose it and I also have a ringing.[2]

(A-28). When asked if she wore a hearing aid, Juror No. 13 stated emphatically, "No. *I'm kind of stubborn about it.*" (A-28) (emphasis added).

After PPL moved to strike Juror No. 13 for cause, Petitioner's counsel requested that the court provide her "with a hearing," presumably referring to a hearing aid, (A-31), despite the fact that Juror No. 13 declined to use a hearing aid. (A-28). When Petitioner's counsel asked about

---

[2] Juror No. 13 exhibited the extent of her hearing impairment in speaking with the District Court. Despite being but three to four feet away from the Judge (A-32), Juror No. 13 failed to hear the Court's question:

> THE COURT: You answered – you also answered a question to the effect, affirmatively or yes to, have you or any member of your family ever [had] to stop work and/or go out on disability because of a health problem that kept them from working.
>
> THE JUROR: Oh, I'm sorry. See, I didn't hear the end of that.
>
> THE COURT: Okay.
>
> THE JUROR: And did you say kept working?
>
> THE COURT: That kept them from working.
>
> THE JUROR: Oh, kept them from working. . . .

(A-28-29).

whether the voices in the courtroom could be magnified, the court clerk explained that experiments had been done with a headphone system but because not everyone was supplied with a microphone and the system merely amplified the existing speaker system, the district court did not have great success in employing the system. (A-31). The district court judge noted that Juror No. 13 had difficulty hearing one of his own questions although she was very close to him, noted the "limited application" of the court's amplification system (A-32), and stated his belief that "it's important that counsel be permitted to try the case in the fashion that they see fit" and that he was "not going to require that counsel sit at counsel tables," and that "it's not appropriate for someone to sit if they're unable to hear everything." (A-33). The court checked again with his clerk as to whether "mobile microphones" were available, to which the Clerk stated "No, not to work through this particular system, no." *Id.* The court then granted PPL's request to strike Juror No. 13 for cause. *Id.*

At trial, the jury returned a verdict for PPL, finding that it did not discriminate or retaliate against Petitioner or fail to accommodate his disability. (A-13 to 16). Following the district court's denial of Petitioner's Motion for a New Trial,[3] Petitioner appealed to the United States Court of Appeals for the Third Circuit, which affirmed the jury verdict in favor of PPL and the denial of Petitioner's motion for a new trial. With respect to the district court's

[3] In Petitioner's motion before the district court, he asserted that he was entitled to a new trial because of the striking of Juror No. 13, errors in the court's mixed motives and failure to accommodate instructions and the verdict slip, and that the verdict was against the weight of the evidence. Of these issues, Petitioner only raises the excusing of Juror No. 13 in his Petition.

excusal of Juror No. 13, the court noted that "28 U.S.C. §1865(b)(4) authorizes a district judge to exclude a juror who 'is incapable, by reason of mental or physical infirmity, to render satisfactory jury service[,]'" and held that "it is proper for a district court to exclude a juror on account of the juror's disability under certain circumstances – that is, when the disability is of a sort that renders the juror unable to perform satisfactory jury service." (A-6). Finding that Petitioner's "assertion that the District Judge made no attempt to accommodate the juror's disability is refuted by the record, which shows that the District Judge evaluated the extent of the juror's impairment and made reasonable efforts to accommodate her[,]" noting that Juror No. 13 stated that she had never worn a hearing aid and that, in fact, she was "stubborn about it[,]" the Court of Appeals found "no abuse of discretion in the District Court's decision to exclude this juror." (A-6 to 7). This Petition followed.

REASONS FOR DENYING THE PETITION

Certiorari is granted only for compelling reasons, such as the existence of a conflict among federal courts on an important federal question. Sup. Ct. R. 10. Petitioner seeks certiorari on the issue of whether the district court abused its discretion in excusing a hearing impaired prospective juror for cause. PPL respectfully submits that certiorari is not warranted, as there is no split of authority among the courts of appeal on this issue, no conflicts with prior decisions of this Court, and no important or unsettled federal question. Contrary to Petitioner's assertion, neither the district court nor the Third Circuit condoned the *per se* exclusion of disabled jurors; this case involves

nothing other than the lower courts' careful and typical review of an individual prospective juror's ability to serve. This is an exercise that is carried out in hundreds of federal courthouses on a daily basis, applying well-settled principles to the individual facts and circumstances of each case. The Third Circuit reviewed in a comprehensive manner the record below and concluded that the district court did not abuse its discretion in dismissing Juror No. 13 for cause. This case simply does not present any "compelling reasons" for review by this Court.

A. Certiorari Should Be Denied Because There Is No Split Of Authority On The Issue Presented And No Important Federal Question Is At Stake.

District courts are empowered by federal law to determine an individual's qualifications for jury service. Specifically, 28 U.S.C. §1865(b)(4) provides that the district court "shall deem any person qualified to serve on grand and petit juries unless he . . . is incapable, by reason of mental or physical infirmity, to render satisfactory jury service[.]" *Id.* In addition, otherwise qualified jurors may be "excluded by the court on the ground that . . . his service as a juror would be likely to disrupt the proceedings, or . . . excluded . . . upon a challenge by any party for good cause shown[.]" 28 U.S.C. §§1866(c)(2), (4).

The main vehicle by which the district court is to evaluate prospective jurors' qualifications to serve is the voir dire process. *United States v. Salamone*, 800 F.2d 1216, 1223-24 (3d Cir. 1986) ("[t]his 'testing' by voir dire remains the preferred and effective means of determining a juror's impartiality" and competence). The rationale behind this method is two-fold: first, it provides a record of

the proceedings which can be reviewed by a higher court and, second, it requires the district court to view and analyze potential jurors as individuals. *Id.* ("'jury competence is an individual rather than a group or class matter.'") (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946)).

Furthermore, the Third Circuit Court of Appeals applies an "abuse of discretion" standard in reviewing a district court's decision to exclude a particular juror. *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 153 (3d Cir. 1995) (applying "abuse of discretion" standard to district court's decision to strike prospective jurors); *United States v. Calabrese*, 942 F.2d 218, 223 (3d Cir. 1991) (recognizing the "special deference" due a district court's determination regarding the competence of a particular juror); *United States v. Ferri*, 778 F.2d 985, 994 (3d Cir. 1985) (refusing to award new trial on ground that trial court refused to excuse allegedly partial juror for cause where trial court conducted ample voir dire; Third Circuit deferred to the judgment of the trial judge because "under our system it is that judge who is best situated to determine competency to serve impartially.").

There is no split among the circuit courts of appeal on the issue before this Court – the courts of appeal and this Court are in agreement that abuse of discretion is the appropriate standard to be applied in evaluating a trial court's decision to exclude or retain prospective jurors. *Thiel, supra*, 328 U.S. at 220 ("[t]he choice of the means by which unlawful distinctions and discriminations [in jury selection] are to be avoided rests largely in the sound discretion of the trial courts and their officers."); *Hopt v. People*, 120 U.S. 430, 434-35 (1887) ("the judgment of the court upon the competency of the juror in such cases

[where] ... it appeared to the court upon [the juror's] declaration, under oath or otherwise, that he could and would ... act impartially and fairly upon the matters submitted to him ... is *conclusive.*") (emphasis added); *Reynolds v. United States*, 98 U.S. 145, 156 (1878) ("[i]t is clear, therefore, that upon the trial of the issue [as to a prospective juror's partiality] raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality.... *The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest.*") (emphasis added); *United States v. Candelaria-Silva*, 166 F.3d 19, 30 (1st Cir. 1999) (district court did not abuse its discretion in excusing prospective juror who indicated he had a medical problem with his eye); *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987) (applying abuse of discretion standard to district court's decision to retain deaf juror where a sign language interpreter was an appropriate accommodation as the juror could actually read sign language).

Nonetheless, Petitioner attempts to fabricate such a rift by distorting the record to suggest that the district court summarily and systematically excluded Juror No. 13 solely because she has a hearing impairment. In doing so, Petitioner relies on the fact that a deaf juror was retained as a juror in *Dempsey* whereas Juror No. 13 was excused in this case. However, the fact that the Tenth Circuit in *Dempsey* affirmed a district court's decision to retain a deaf juror, who was capable of reading sign language, to serve with the aid of a sign language interpreter does not create a split with the Third Circuit Court of Appeals merely because it affirmed a district court that, after a

thorough evaluation of the prospective juror at issue, came to a different factual conclusion. *Compare Dempsey*, *supra*, 830 F.2d at 1086, *with* Opinion at A-3 to 12. In evaluating the district court's refusal to excuse a deaf juror merely because she was deaf, the *Dempsey* court applied an abuse of discretion standard, the very same standard applied by the Third Circuit in the instant case. Importantly, the Tenth Circuit stated that the juror's

> ability to perceive and weigh the evidence is best evaluated by the trial judge. [The juror] was both literate and articulate; her ability to speak and read lips mitigated the effects of her hearing loss. . . . We hold that the trial judge did not abuse her discretion in allowing [the juror], with the aid of an interpreter, to consider evidence presented at trial.

Dempsey, *supra*, 830 F.2d 1088-89.

Petitioner presents nothing to suggest that the Third Circuit's analysis of the district court's exercise of discretion with regard to Juror No. 13 applied a standard different from that applied by the Tenth Circuit or came close to implicating an issue that needs resolution by this Court.

The remainder of the cases relied upon by Petitioner are equally inapplicable in that they each involve decisions to strike potential jurors, not based on an individual analysis of their suitability for jury service, as occurred here, but based solely upon the potential jurors' inclusion in or identification with a certain group or class. *See Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) ("women cannot be systematically excluded from jury panels from which petit juries are drawn."); *Thiel*, *supra*, 328 U.S. at 220 ("prospective jurors shall be selected by court officials

without systemic and intentional exclusion of any ... economic, social, religious, racial, political [or] geographical ... groups[; j]ury competence is *an individual* rather than a group or class matter.") (emphasis added); *Ballard v. United States*, 329 U.S. 187, 193 (1946) (same); *Salamone*, *supra*, 800 F.2d at 1224 (finding error in systematically and arbitrarily excluding all NRA-related jurors from panel, without further inquiry of the individual jurors, in firearms case); *New York v. Guzman*, 478 N.Y.S.2d 455, 459-60 (N.Y. Sup. Ct. 1984) (the "blunt constraint that no deaf person can be qualified to sit on a jury is a passe conclusion which defies and has no connection to reality or common sense[;]" deaf persons "are not all the same" and "[t]hus, with respect to a disability, the court must determine whether the scope of a disabled person's impairment would preclude him from serving as a reasonable juror or would adversely affect the rights of the litigants.").

PPL's motion to strike Juror No. 13 for cause and the district court's decision to grant that request were not based upon the mere fact that the potential juror had a disability; they were based on a careful assessment of the potential juror's ability to serve in this case. Thus, the district court questioned Juror No. 13 in such a manner as to determine the extent of her hearing impairment and undertook inquiries as to the court's ability to accommodate her. (A-28 to 33). In doing so, the district court considered at least three different types of accommodations – moving the juror to the front row, utilizing an amplification system, and utilizing mobile microphones – and determined that they would not provide an effective accommodation.

Further, the district court personally observed the extent of Juror No. 13's hearing impairment when, from

three to four feet away, he had to repeat himself because Juror No. 13 could not hear all of what he said. (A-28-29, 32). Neither at trial nor before the Third Circuit Court of Appeals did Petitioner identify any effective accommodation that would have permitted Juror No. 13 to serve effectively.[4]

It is a gross distortion of the record for Plaintiff to assert that "[t]he trial court never took the time to see how it could accommodate the hearing impaired juror. Instead, the trial court got rid of its problem the quickest way possible – by excluding the disabled from jury service." (Petition, at 16). To the contrary, the record clearly establishes that the district court carefully questioned Juror No. 13 to identify the extent of her hearing impairment and its probable effect on her ability to effectively serve as a juror, and assessed the availability of any accommodating equipment. Likewise, the Third Circuit applied the correct abuse of discretion standard in reviewing the district court's decision.

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[4] In yet another example of Petitioner's failure to establish that an *appropriate* accommodation was available for Juror No. 13, Petitioner failed to establish that Juror No. 13 was even capable of reading sign language or that a sign language interpreter would have been an appropriate accommodation. Furthermore, while Petitioner now suggests that Juror No. 13 could "easily" have been accommodated via an "infrared assistive listening device system that was available to the court" (Petition, at 8), he failed to make such a request in the district court.

CONCLUSION

Petitioner has failed to establish any compelling reasons for this Court to grant the Petition. Therefore, PPL Services Corp. respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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